United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7015

No. 76-7015

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT, N. Y.

B
P/S

KENIL K. GOSS,
Plaintiff-Appellant Pro Se

v.

REVLON, INCORPORATED and its wholly owned subsidiary, USV PHARMACEUTICAL CORPORATION,
Defendants-Appellees

DISCRIMINATION APPEAL FROM THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S INTERIM BRIEF IN SUPPORT OF HIS APPEAL

DATED: Thursday, May 6, 1976

Sent by Certified Mail on
this 6th Day of May, 1976

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PART I

INTRODUCTION

INTRODUCTION

This is an interim brief, in the form of an affidavit, filed by the plaintiff-appellant pro se (hereinafter referred to as the "plaintiff"), for the sole purpose of complying with the leave dated April 28, 1976 of the United States Court of Appeals for Second Circuit, New York (hereinafter referred to as the "court"), granting an extension of time upto May 6, 1976, within which to file the plaintiff's brief in support of his appeal, lest any further extension of the time limit, as prayed in his motion dated May 3, 1976 and in a personal letter addressed to the Honorable Chief Judge Irving R. Kaufman of the court, be denied by the court, or be opposed by the defendants-appellees (hereinafter referred to as the "defendants"), or lest the defendants might move for dismissal of the appeal under Rule 31(c) of the Federal Rules of Appellate Procedure (hereinafter referred to as the "FRAP").

Accordingly, it is his desire and hope to write, type, copy and file a more extensive brief than the present one, that would do justice to the substantive issues raised by him in the course of his relentless and singlehanded fighting the 'motion war' during the last three years against the Equal Employment Opportunity Commission (hereinafter referred to as the "EEOC"), against the defendants and against the United States District Court for the Southern District of New York (hereinafter referred to as the "lower court").

The submission of such extensive brief would be possible only after the dispositions of the pending matters with the EEOC and with the lower court, as he has already pointed out in his personal letter dated May 3, 1976 to the Honorable Chief Judge of the court and in his motion dated and mailed on May 3, 1976. For further details please see his motions dated February 19, 1976 and April 20, 1976, and his letters dated January 19, 1976 and February 19, 1976 to the Clerk of the court.

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PART II

ISSUES PRESENTED FOR REVIEW

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The tentative issues presented for review by the court, given that some of the issues have not yet been crystalized, until the dispositions of the pending matters mentioned under the INTRODUCTION of this brief be made known to the plaintiff, are as follows:

(1) JURISDICTIONAL PREREQUISITES:

The questions to be resolved under this sub-heading are as follows:

(A) Did the plaintiff really fail "to comply with the jurisdictional requirements of 42 U.S.C. 2000e-5", as alleged by the defendants and by the lower court?

(B) Even assuming, argüendo, that the plaintiff had technically failed to comply with the jurisdictional prerequisites for the suit in the lower court, could the lower court dispense with the requirement for a trial in order to determine whether or not such was the fact, where the plaintiff had averred that: "All jurisdictional prerequisites have been complied with prior to the filing of this suit", in accordance with Rule 8(a) of the Rules of Civil Procedure for the United States District Court (hereinafter referred to as the "FRCP")?

(2) TIMELINESS OF THE CHARGE FILED WITH THE EEOC:

The questions to be resolved under this sub-heading are as follows:

(A) Is the timely filing of the charge with the EEOC is still a required precondition for the subsequent civil suit, as alleged by the defendants, which the lower court has apparently sustained, without actually saying so?

(B) Has not Section 706(f)(1) of the Civil Rights Act of 1964, introduced by Section 4(a) of the Equal Employment Opportunity Act of 1972, dispensed with the requirement

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of the timely filing of the charge with the EEOC as a condition precedent for the subsequent civil suit in a United States district court, as under the original Section 706(e) of the Civil Rights Act of 1964, and, in its place, now requires only the dismissal of the charge by the EEOC, for whatever reason or reasons, followed by the filing of the civil suit by the person aggrieved within ninety days thereof?

(3) CONTINUING VIOLATIONS:

The questions to be resolved under this sub-heading are as follows:

(A) Is it a case of "continuing violation" where the plaintiff still continues to be a victim of breaches of contracts, which are still valid and binding under the New York State laws, and where at least one such breach of contract is still continuing, as has been alleged by the plaintiff?

(B) Is it reasonable for the lower court to refuse to hear, or even to read his detailed submission, as to the above question (3)(A)?

(4) EXTENUATING CIRCUMSTANCES:

The questions to be resolved under this sub-heading are as follows:

(A) Even assuming, argüendo, that all of the preceding three sets of questions are inoperative to the plaintiff's case, would not the "extenuating circumstances", pleaded so extensively by the plaintiff, be taken into account in determining whether to sustain or to dismiss his suit?

(B) Is it proper for the lower court not to hear fully what the plaintiff had to say on the above question (4)(A) before dismissing his suit?

(5) PREMATURE AND WRONGFUL DETERMINATION BY THE EEOC:

The questions to be resolved under this sub-heading are

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as follows:

(A) Is it not a duty of the lower court to investigate an allegation by the plaintiff that the EEOC had prematurely and wrongfully determined and dismissed his charge to the EEOC, in order to determine whether to sustain or dismiss his suit?

(B) If the answer to the above question is in the affirmative, then, has not the lower court erred in dismissing his suit off hand, not once but twice - on November 7, 1975 and again on December 31, 1975?

(6) FLEXIBILITY OF THE DEADLINE FOR FILING OF A CHARGE:

The questions for resolution under this sub-heading are the following:

(A) How far the doctrine of flexibility of the time limit for filing of a charge with an administrative agency, such as the EEOC, enunciated by the landmark decisions of the United States Supreme Court in Minnesota Mining and Manufacturing Company v. New Jersey Wood Company, 381 U.S. 311 (1964) and in Burnett v. New York Central Railroad Company, 380 U.S. 424 (1965), and of the Fifth Circuit in Culpepper v. Reynolds Metals Company, 421 F2d 888 (1970), in which the above Supreme Court cases were cited, is applicable to the appeal at bar?

(B) If the above decisions are indeed applicable to the plaintiff's case, then, was it right for the lower court to dismiss it without any hearing or a trial of his then 518 page submissions, supported by 7,452 pages of the defendants' own documents?

(7) CIVIL RIGHTS ACT OF 1866:

The questions under this sub-head to be resolved are as follows:

(A) Did the plaintiff properly assert the jurisdiction of the Act in his motion dated August 8, 1974?

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(B) If so, then, was it proper for the lower court not to hear it, not to deal with it, and not even to read it, and then to dismiss the plaintiff's suit?

(8) THIRTEENTH AMENDMENT:

The questions under this sub-head for resolution are as follows:

(A) Did the plaintiff properly allege violation of his constitutional right under the Thirteenth Amendmendment to the Constitution of the United States of America, so as to render it as a triable issue for the lower court?

(B) If so, was it then proper for the lower court not to hear it, not to put it on trial, and not even to read it, and then to dismiss the plaintiff's suit?

(9) AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967:

The questions to be resolved under this sub-head are as follows:

(A) Did the plaintiff properly invoke ab initio the jurisdiction of this Act as a triable issue?

(B) If, so, was it then proper for the lower court not to hear it, not to put it on trial, and not even to read it, and then to dismiss the plaintiff's suit?

(C) Are the defendants right in contending that: "Plaintiff seeks to amend his complaint to assert a claim under 29 USC 626 for discrimination because of age. However, similar to Title VII, the statute also mandates that charges must first be filed with the Secretary of Labor before commencement of any civil action", where the plaintiff:

(a) indeed asserted the jurisdiction under the Act in his original complaint, but repeated it in his subsequent motions?

(b) was informed over the telephone on March 25, 1974 by an official of the Department of Labor, acting as a

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delegate for the Secretary of Labor, that since a valid and timely charge had then been, and still is, in "suspended animation" with the New York State Division of Human Rights, the Department of Labor could not deal with the matter, and thereby had waived the requirement for a "notice of intent to sue"? and

(c) is ready to prove that it is a case of "wilful violation", and hence the time limit to bring a suit is three years, as provided under Section 6 of Portal-to-Portal Act of 1947 (29 U.S.C. 255), and not 180 days, as incorrectly alleged by the defendants?

(10) NEW YORK STATE STATUTE OF LIMITATION OF ACTIONS:

Is the New York State statute of limitation of actions tolled, where a valid and timely charge, based on the same facts and issues, has been filed with the New York State Human Rights Division, which then has suspended its jurisdiction solely for the purpose of the present suit?

(11) CLASS ACTION:

Was the denial of the plaintiff's timely leave for a class action proper:

(a) where the plaintiff had made extensive submissions, supported by the defendants' own incontrovertible documents. showing conclusively of their widespread unlawful employment practices, and without even reading, let alone hearing, them? and

(b) without even hearing the defense attorney had to say - in fact, cutting him short in the middle of a sentence he was saying - against the plaintiff's leave?

(12) SUMMARY JUDGMENT:

Was it proper for the lower court to give summary judgment to the defendants, and followed by summary dismissal of the plaintiff's complaint, under Rule 56(c) of the FRCP:

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(a) where the plaintiff had submitted no less than 518 pages of arguments and citations, showing that there was a "genuine issue" which could be resolved only by a trial?

(b) where the lower court, by its own admission, did not even think fit to consider any of the plaintiff's timely voluminous submissions, and possibly not even reading them?

(c) where the Honorable Judge said: "I am reserving decision on your motion and on Revlon's motion", and at the same time said: "I am directing you within a week to turn these secret documents over to the attorneys for Revlon", while on the same day (namely, November 7, 1975), unknown to the plaintiff, the Honorable Judge issued a summary judgment for the defendants, but on November 10, 1975, again unknown to the plaintiff, the Honorable Judge dismissed the plaintiff's suit, thus, putting the plaintiff to needless pain and suffering in xerox copying and delivering to the defense attorneys 4,973 pages of the defendants own documents, costing the plaintiff $530.87?

(d) where the lower court apparently had found that:

(i) the "DEFENDANTS' MEMORANDUM OF LAW" as acceptable, even though filed on October 14, 1975 - that is, 564 days after the Judge's oral order on March 29, 1974 - and even though it contained many inaccuracies, such as, quotations from out of date statutes and cases, misleading quotations, untrue statements and comments, and so on?

(ii) the defendants' "AFFIDAVIT IN OPPOSITION", and "NOTICE OF CROSS MOTION" together with its supporting papers, as acceptable, even though filed 12 days too late contrary to Rule 15 of the FRCP, and even though these defense papers were replete with unabashed lies and even perjuries? but

(iii) the plaintiff's brief dated August 28, 1974, which was docketed on September 3, 1974 (that is, 158 days after the Judge's oral order on March 29,

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1974, or 406 days before the defendants filed their brief), as unworthy of any consideration, possibly even of reading?

(13) "BIAS OR PREJUDICE OF JUDGE" UNDER 28 U.S.C. 144:

Did the Honorable Judge of the lower court, knowingly or unknowingly, show "bias or prejudice" against the plaintiff's case, as detailed in his factual affidavits dated December 26, 1975 and April 30, 1976, so as to merit a new trial by another judge, as required by 28 U.S.C. 144?

(14) THE DEFENDANTS' CONTINUING CONTEMPT OF COURT:

Is the above captioned issue triable, and if so, can the defendants be immediately compelled to reimburse the plaintiff's long due out of pocket expenses of $530.87 in xerox copying and delivering 4,973 pages of the defendants' own documents, plus a small balance of $2.12 from the earlier delivery, or a total of $532.99, which the defendants have refused to do so, in contempt of the lower court's orders dated December 11, 1974, May 2, 1975 and November 7, 1975?

(15) NEW MATERIAL FACTS AND CITATIONS SUBMITTED TO THE EEOC:

Are not these new material facts and supported by several landmark decisions, which have come to light subsequent to the dismissal of the plaintiff's suit on November 7, 1975, and which are at the present time under study by the EEOC's Headquarter in Washington, D.C., ground for a new trial?

(16) DENIAL OF THE PLAINTIFF'S MOTION FOR A NEW TRIAL:

Did the lower court abuse its diecretion in denying the plaintiff's motion dated December 26, 1975 for a new trial, presenting some of the new material facts and citations?

(17) ARBITRARY FINE OF $50 IMPOSED UPON THE PLAINTIFF:

Did the lower court abuse its discretion in imposing an arbitrary fine of $50 upon this unaffluent plaintiff payable

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to the defendants, quite contrary to the very spirit with which the Congress of the United States of America has enacted the Title VII of the Civil Rights Act of 1964 and other companion legislations against employment discrimination, and quite contrary to many landmark decisions of the United States Supreme Court, Courts of Appeals and District Courts, and more specifically to the landmark decision of Fifth Circuit in Miller v. International Paper Company, 408 F2d 283(1969), in which the Fifth Circuit found that "the district court abused its discretion when it imposed cost and fee penalties upon the appellants" under circumstances more culpable than the present case at bar?

(18) THE DEFENDANTS' PERJURY:

Have the defendants committed a crime of perjury within the meaning of 18 U.S.C. 1621 for making a false statement under oath in material matter for the sole purpose of obtaining the dismissal of the plaintiff's suit, and did obtain the said dismissal thereby?

(19) THE DEFENSE ATTORNEYS' SUBORNATION OF PERJURY:

Have the defendants' attorneys of record committed a crime of subornation of perjury within the meaning of 18 U.S.C. 1622 for 'doctoring' and procuring an employee of the defendants to commit the perjury under item (18) above, for the sole purpose of obtaining the dismissal of the plaintiff's suit, and did obtain the said dismissal thereby?

(20) GROUNDS FOR A 'MISTRIAL':

Do the the plaintiff's allegations under items (1)(B), (3)(B), (4)(B), (5)(B), (6)(B), (7)(B), (8)(B), (9)(B), (11), (12), (13), (16), (17), (18) and (19) constitute grounds for a 'mistrial', even though no trial at all ever held by the lower court?

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PART III

STATEMENT OF THE CASE

STATEMENT OF THE CASE

GENERAL NOTE:

Due to the shortage of time to meet the plaintiff's filing deadline today, he is unable to submit full details now, but hopes to be able to furnish the same in a more comprehensive brief to be filed in due course. In the meantime, please refer to his original record, mutatis mutandis, as referenced below.

NATURE OF THE CASE:

Please see the first two paragraphs under BRIEF HISTORY OF THE CASE on page 1 of the plaintiff's motion for a new trial dated December 26, 1975.

COURSE OF PROCEEDINGS:

Please see BRIEF HISTORY OF THE CASE, with the exception of the first two and the last paragraphs, from pages 1 to 3 of the plaintiff's motion for a new trial dated December 26, 1975.

DISPOSITION IN THE LOWER COURT:

Please see the penultimate paragraph on page 2, ibid. Please also see item (12) SUMMARY JUDGMENT on pp. 8 - 10 of this interim brief.

PART IV

ARGUMENT

ARGUMENT

GENERAL NOTE:

The same as on page 13 of this interim brief.

(1) JURISDICTIONAL PREREQUISITES:

Please see the plaintiff's motions dated August 28, 1974 (pp.19 - 28, together with Exhibits 21 to 28 attached thereto), November 3, 1975 (item (1) on page 35) and December 26, 1975 (item (d) on page 5).

(2) TIMELINESS OF THE CHARGE FILED WITH THE EEOC:

Vide the plaintiff's motions dated August 28, 1974 (item (C) (1) to (6) on pp. 19 - 21) and December 26, 1975 (item (d) on page 5).

(3) CONTINUING VIOLATIONS:

Vide the plaintiff's motions dated August 28, 1974(item (7) on page 21), November 3, 1975 (item (2) on page 35) and December 26, 1975 (item (f) on page 6).

(4) EXTENUATING CIRCUMSTANCES:

Vide his motions dated August 28, 1974(item (9) on pp. 22 - 23), November 3, 1975(item (1)(C) on page 35) and December 26, 1975(item (C)(a) on page 6).

(5) PREMATURE AND WRONGFUL DETERMINATION BY THE EEOC:

The matter is under investigation by the EEOC's Headquarter at the present time, and is for the present non-adversarial in nature. In the meantime, please see items (6) and (7) on pp. 19 - 21 of his motion dated November 3, 1974.

(6) FLEXIBILITY OF THE DEADLINE FOR FILING OF A CHARGE:

The remarks as under item (5) above.

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(7) CIVIL RIGHTS ACT OF 1866:

Vide his motions dated August 8, 1974(item (G) on p. 11), July 7, 1975(item (E) on p. 4), November 3, 1975(item (5) on p. 36) and December 26, 1975(item (B)(a) on page 4).

(8) THIRTEENTH AMENDMENT:

Vide his motions dated August 8, 1974(item (G) on p. 11), July 7, 1975(item (E) on p. 4) and December 26, 1975(item (B)(b) on p. 4).

(9) AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967:

Vide his motion dated December 26, 1975(item (c) on p. 5).

(10) NEW YORK STATE STATUTE OF LIMITATION OF ACTIONS:

To be submitted.

(11) CLASS ACTION:

Vide his motions dated July 7, 1975(item (F) on p. 4) and November 3, 1975(item (4) on p. 36).

(12) SUMMARY JUDGMENT:

Vide item (A)(a) of his motion dated December 26, 1975 on page 3.

(13) "BIAS OR PREJUDICE OF JUDGE" UNDER 28 U.S.C. 144:

Vide the plaintiff's affidavit dated April 30, 1976.

Other pints to be dealt with in the plaintiff's more detailed brief.

CERTIFICATE OF SERVICE:

A xerox copy of this interim brief is being sent by Certified Mail today to the defendants' attorneys of record.

Sworn to Before me, this
6th Day of May, 1976.

CHARLES G. [illegible]
Notary Public State of New York
NO. 60-52[illegible]00
Qualified in Westchester County
Certificate Filed in Bronx County
Commission Expires March 30, 1978

Kenil K. Goss

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Appellant Pro Se

No. 76-7015

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